***Jones v. Flowers* and its Impact on Bankruptcy Practice**

By Jeremy J. Gugino and Heather Rowe[1]

I. Introduction

Elvis and Due Process would be odd bedfellows for sure, but had the Arkansas Commissioner of State Lands listened to the King he may have saved himself a recent trip to the United State Supreme Court. In Presley's famed rendition of "Return to Sender" a forlorn lover sends a batch of letters to his sweetheart, only to get them back marked "return to sender, address unknown." In the end, he vows: "This time I'm gonna take it [the letter] myself/And put it right in her hand." In that spirit, Chief Justice John Roberts and four other justices held Commissioner Mark Wilcox should have taken "additional reasonable steps" to provide actual notice to a homeowner whose house was being sold in a tax sale, after certified notice letters were returned undelivered. *Jones v. Flowers*, Case No. 04-1477, slip op. at 12 (April 26, 2006).

The decision does not require actual notice to satisfy due process, but it does prohibit the government from sticking its head in the sand once it finds out notice efforts have failed. The decision also seems to put another nail in the coffin of notice by publication, even as a supplemental measure.

Since "so much of the daily diet of bankruptcy practice is handled by 'notice and

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[1] Mr. Gugino and Ms. Rowe are law clerks for Chief Bankruptcy Judge Terry L. Myers and Bankruptcy Judge Jim D. Pappas respectively. The intent of this article is to bring attention to the *Flowers* decision and how it could affect bankruptcy practice in this District, so that practitioners may better serve their clients and the bankruptcy bar. The conclusions contained herein do not reflect the opinions of the judges in this district. This document should not be considered legal advice.

hearing' under § 102(1)"[2] the *Flowers* decision certainly has the potential to impact bankruptcy proceedings.[3] This is especially true considering bankruptcy regularly involves adjudication of property rights[4] and use of the mails dominates notice practice under the Bankruptcy Rules.[5]

Part II of this article examines the majority 5-3[6] opinion, as well as the dissent by Justice Thomas. Part III examines the circuit law that developed prior to *Flowers*. Part IV utilizes a hypothetical situation to provide an overview of possible issues the decision raises in the bankruptcy arena.

II. *Jones v. Flowers*: Tale of a Tax Sale

A. Facts

The facts of this case began, quite innocently, in 1967 when Gary Jones and his wife Jean bought a home located at 717 North Bryan Street in Little Rock, Arkansas. The

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[2] *In re Lancaster*, 03.1 I.B.C.R. 31, 32 (Bankr. D. Idaho 2003). *See also In re One Hundred Building Corp.*, 97.2 I.B.C.R. 56, 57 (Bankr. D. Idaho 1997) ("The concept of 'notice and a hearing' [under § 102(1)] has been deliberately crafted as a flexible one to provide procedural assurance that a party's rights to due process of law are maintained under differing circumstances.").

[3] *See, e.g.*, *In re Millspaugh*, 04.1 I.B.C.R. 25, 28 (Bankr. D. Idaho 2004) ("Taking a property interest from a creditor. . . raises due process concerns."). *See also In re Argonaut Fin. Servs., Inc.*, 164 B.R. 107, 111 (N.D. Cal. 1994) ("The Due Process Clause of the United States Constitution applies to proceedings under the Bankruptcy Code.") (citing *Bank of Marin v. England*, 385 U.S. 99, 102 (1966) and *In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985)); *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293 (1953) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

[4] Property rights are regularly adjudicated when seeking a sale of property under § 363, determination of secured status under § 506, avoidance of a lien impairing an exemption under § 522(f) or modifying secured claimants' rights under § 1322(b)(2).

[5] *See, e.g.*, Fed. R. Bankr. P. 7004, 7005.

[6] Justice Alito took no part in the consideration or decision of the case.

two lived there together until 1993 when they separated. Ms. Jones remained in the home, while Mr. Jones moved into an apartment. Neither one of them notified the tax collector of Mr. Jones' new address as required by Ark. Code Ann. § 26-35-705. Mr. Jones continued to pay the property taxes with the mortgage until the house was paid off. After that, the state tax collector sent property tax bills addressed to Mr. Jones to the North Bryan Street address in 1997, 1998 and 1999. He never received the bills and they were never paid.

In February 2000, the property was certified delinquent. In April, Arkansas' Commissioner of State Lands ("Commissioner") sent notice to Mr. Jones, via certified mail, alerting him of the delinquency and his right to redeem. The notice also explained the real property would be subject to public sale in April, 2002. However, the notice was returned "unclaimed."

Two years later, just weeks before the scheduled sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. Eventually, Linda Flowers submitted a private offer to buy the property. The Commissioner sent another certified letter to Mr. Jones at the North Bryan Street address. The letter informed him that unless he paid the delinquent taxes, the property would be sold. Again, the letter was returned "unclaimed." Ms. Flowers bought the property for $21,042.15. Once the statutory 30-day post-sale redemption period ran, Flowers served an unlawful detainer on Mr. Jones' daughter, who was living at the house. The daughter then notified her father, who found out for the first time about the sale.

The Pulaski County Court ruled in favor of the Commissioner and the Arkansas

State Supreme Court affirmed.[7]

B. Supreme Court: *Jones v. Flowers*, Doc. No. 04-1477 (April 26, 2006)

The Court wasted no time reiterating two longstanding and interrelated rules of due process: a property owner need not receive actual notice before the government may take his property[8], but the government must take steps "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[9] The "new wrinkle" presented by the case was the State finding out before the tax sale that its notice efforts had failed.[10] The issue was whether this "wrinkle" required the government to take additional steps to try to give Mr. Jones actual notice of the sale.

The Court noted two key provisions of *Mullane v. Cent. Hanover Bank & Trust Co*. First, "when notice is a person's due . . .[the] means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[11] Furthermore, the adequacy of a particular form of notice requires balancing the "interest of the State" against the "individual interest sought to be protected by the Fourteenth

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[7] *Jones v. Flowers*, 359 Ark. 443, 2004 WL 2609800 (Ark. Nov. 18, 2004).

[8] *Jones v. Flowers*, Case No. 04-1477, slip op. at 4 (April 26, 2006) *(citing Dusenberry v. United States*, 534 U.S. 161, 170 (2002); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n. 3 (1983) ("Our cases have required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only for *in personam* actions.").

[9] *Flowers*, slip op. at 4 (citing *Mullane*, 339 U.S. at 314).

[10] *Id.* at 5.

[11] *Mullane*, 339 U.S. at 315.

Amendment."[12] Applying those rules, the *Flowers* Court reasoned "[w]e do not think that a person who actually desired to inform a real property owner of an impending tax sale would do nothing when a certified letter sent to the owner is returned unclaimed."[13] When the certified letter sent to Mr. Jones was returned undelivered, the Commissioner had good reason to suspect Mr. Jones was "no better off than if notice had never been sent."[14] The Court concluded that the Commissioner, by taking no further action, was not acting like someone "desirous of actually informing" Mr. Jones.[15]

The *Flowers* Court also implied the State created its own problems. By utilizing certified mail "the State knew *ex ante* that it would probably learn whether its effort to effect notice through certified mail had succeeded."[16]

So what additional reasonable steps should the Commissioner have taken? To begin with, the Court suggested resending the notice via regular first class mail. The

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[12] *Id*. at 314.

[13] *Flowers*, slip op. at 7.

[14] *Id* at 8. (quoting *Malone v. Robinson*, 614 A.2d 33, 37 (D.C. App. 1992)).

[15] *Id*. The Court found the Commissioner's failure to take additional reasonable steps particularly appalling since the State was selling Mr. Jones' house: "the State is exerting extraordinary power against the property owner–taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Id*. at 17.

[16] *Id*. at 9-10. The Commissioner argued that requiring the state to take additional reasonable steps would prompt it to employ means of notice that do not generate additional information, *i.e.*, send notice via regular mail instead of certified mail. Justice Roberts dismissed this argument, stating "[w]e find this unlikely, as we have no doubt that the government repeatedly finds itself being asked to prove that notice was sent and received. Using certified mail provides the State with documentation of personal delivery and protection against false claims that notice was never received." *Id*. at 15-16. This stance seems to ignore the so-called "mailbox rule" that "[a] properly executed certificate of mailing creates a presumption of receipt of notice." *Moody v. Bucknum (In re Bucknum)*, 951 F.2d 204, 206 (9th Cir. 1991); *In re Ware*, 98.4 I.B.C.R. 130 (Bankr. D. Idaho 1998).

Court also recommended addressing the notice to "Occupant," thus increasing the chances that anyone living there would open it. It also indicated posting notice on the home would have been a reasonable additional step. The majority additionally expounded on what steps the government does not have to take, such as conducting an open-ended search of the local phone book or state income tax records.

The Court made three additional points. First, the owner's failure to comply with the change of address statute (Ark. Code. Ann. § 26-35-705) did not forfeit his right to constitutionally sufficient notice.[17] The Court also dismissed the Commissioner's inquiry notice argument, concluding that "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property."[18] Finally, the Court refused to impose a duty on occupants to follow up on certified mail addressed to the property owner.[19]

An interesting side note to this case is the Court's almost complete disregard for the State's efforts to give notice by publication once the letters were returned undelivered. Granted, notice by publication is almost never constitutionally sufficient by itself,[20] but in

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[17] *Flowers*, slip op. at 10. The Court stated Mr. Jones' failure to comply with the statute leant strong support to the Commissioner's argument that mailing the letter to the address of record was "reasonably calculated" to reach Mr. Jones. However, the statute gave no recourse to the state once it discovered its efforts to effect notice had failed.

[18] *Id.* at 11 (citing *Mennonite Bd. of Missions*, 462 U.S. at 800).

[19] *Id*. at 12.

[20] The *Mullane* Court noted "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper[.]" *Mullane*, 339 U.S. at 315. Accordingly, publication as the sole means of notice will be constitutionally

this case, it supplemented the certified mailing. Still, the Court stated "[i]n response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did–*nothing*."[21] (emphasis added). The majority tempered its remarks later in the opinion, concluding "[f]ollowing up by publication was not constitutionally adequate *under the circumstances presented here* because, as we have explained, it was possible and practicable to give Jones more adequate warning of the impending tax sale." (emphasis added).[22]

C. Thomas Dissent

Justice Thomas, joined by Justices Scalia and Kennedy, penned a lengthy dissent. He gave great weight to the fact that Mr. Jones did not notify the tax collector of his change of address, as he was statutorily required to do, or arrange for the occupant to notify him of incoming mail. The dissent also took the "reasonably calculated" requirement to apply to the time of mailing. That the letters came back undelivered did not change the fact that notice was reasonably calculated, *ex ante*, to succeed. Furthermore, the dissent found the use of notice by publication to be a constitutionally suitable supplement to certified mailing. Finally, Thomas argued the additional reasonable steps the Commissioner could have taken, i.e. regular mail and posting, were no more reasonably calculated to achieve actual notice than the methods employed in the case.

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sufficient only when the person to be notified is "missing or unknown." *Id*. at 317.

[21] *Flowers*, slip op. at 12.

[22] *Id.* at 16.

III. Notice Before *Jones v. Flowers*

The Due Process concerns at issue in *Flowers* had already been vetted in the circuits, at least in the context of forfeiture proceedings.[23] The majority of the circuits were in agreement with *Flowers*, including the Ninth. The First[24] and Eighth[25] circuits held the line articulated by the *Flowers* dissent. Furthermore, many states already require by statute that additional measures be taken to give homeowners actual notice of tax sales should mailing fail.[26]

The additional steps required by the circuits have varied. For instance, notice was found constitutionally deficient when the arresting authorities failed to consult "obvious" alternative sources from which to ascertain the plaintiff's correct address.[27] Likewise, sending forfeiture notices to two of an owner's three known addresses did not satisfy due

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[23] *See, e.g.*, *United States v. Ritchie*, 342 F.3d 903, 911 (9th Cir. 2003); *Foehl v. United States*, 238 F.3d 474, 480 (D.C. Cir. 1998); *United States v. Rodgers*, 108 F.3d 1247, 1252-53 (10th Cir. 1997)*; Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1161 (2nd Cir. 1994); *Barrera-Montenegro v. United States*, 74 F.3d 657, 660 (5th Cir. 1996). *See also Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000) (declining to adopt *per se* rule that examines notice only at the time it is sent, but also declining to impose an affirmative duty to seek out claimants in every case where notice is returned undelivered).

[24] *Sarit v. United States Drug Enforcement Admin.*, 987 F.2d 10 (1st Cir. 1993).

[25] *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995).

[26] Under Idaho Law, the county tax collector in which the subject property is located must serve notice of the issuance of a tax deed on all record owners and parties in interest by certified mail. Idaho Code § 63-1005(2)(a). If it is returned undelivered, the collector must "attempt[] to locate and serve the record owner or owners and parties in interest." Idaho Code § 63-1005(2)(b). Only then, may the collector try to serve notice by publication. *Id*. *See also* Wash. Rev. Code § 84.64.050(4) (requiring county treasurer to serve notice and summons of foreclosure on occupant of property if certified mail comes back undelivered, and give notice by publication); Mont. Code Ann. § 15-18-212 (requiring county clerk to serve notice of issuance of tax deed by certified mail on owner, occupant and all parties in interest, followed by publication if "the address of an interested party is not known.").

[27] *Foehl v. United States*, 238 F.3d 474, 480 (3rd Cir. 2001).

process, even though the owner was a fugitive.[28] A search of town tax records, as opposed to a county-wide search, has also been deemed unreasonable.[29] Other courts have suggested that following up by consulting the local phone directory may be reasonable under certain circumstances.[30] However, if the signature of a certified mail recipient is illegible, the government is not required to take additional steps to verify the signatory is the person whose property interest will be affected.[31]

The Idaho Supreme Court took a stance similar to the "obvious alternative sources" decision noted above. In *Giacobbi v. Hall*, 109 Idaho 293, 707 P.2d 404 (1985), the majority held the tax collector's failure to follow up on "obvious leads" contained in county tax records (like contacting the title company to find the owner's address) was not diligent or reasonable. *Id*. at 298, 707 P.2d at 408.

IV. *Flowers* and the Bankruptcy Arena

As the bankruptcy court in *In re C.V.H. Transport, Inc.* noted: "Implicit in the drafting of our procedural rules is that their literal application will result in just such notice which satisfies constitutional due process requirements."[32] In light of *Flowers*, this statement may not always be true. Mail is still "recognized as an efficient and

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[28] *Rodgers*, 108 F.3d at 1252.

[29] *Akey v. Clinton County*, 375 F.3d 231, 237 (2nd Cir. 2004).

[30] *Plemons v. Gale*, 396 F.3d 569, 577 (4th Cir. 2005) (citing *Small v. United States*, 136 F.3d 1334, 1338 n.3 (D.C. Cir. 1998)).

[31] *Lobzun v. United States*, 422 F.3d 503, 508 (7th Cir. 2005)

[32] 254 B.R. 331, 333 (Bankr. M.D. Pa. 2000) (cited by *In re Chamberlin*, 04.1 I.B.C.R. 31, 33 (Bankr. D. Idaho 2004)).

inexpensive means of communication."[33] However, because bankruptcy practice is so mail and email intense, it may be just a matter of time before citations to *Flowers* pop up in the Bankruptcy Reporter.

A. Use of the Mails in Bankruptcy

It has been noted that "[s]ervice by mail is a special aspect of bankruptcy litigation" with "Rule 7004 having been enacted by Congress '[i]n recognition of the time constrains in bankruptcy proceedings and to insure simple and expeditious service of defendants to such proceedings.'"[34] Strict adherence to the rule normally will ensure that notice passes constitutional muster.

Federal Rules of Bankruptcy Procedure 7004 and 7005 (incorporating Fed. R. Civ. P. 5) are two linchpin rules of bankruptcy practice. Bankruptcy Rule 7004(b) allows service of a summons and complaint via first class mail. The rule has withstood constitutional attack for procedural due process concerns,[35]and *Flowers* does not change that. In fact, as noted *supra,* the *Flowers* Court actually suggests following up with first class mail when certified mail is returned undelivered.

Once an adversary proceeding is commenced, Rule 5(b)(2)(B) allows service of pleadings, motions, notices and various other documents by first class mail. Rule

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[33] *Mullane,* 339 U.S. at 319.

[34] *Ultrasonics, Inc. v. Eisberg* (*In re Ultrasonics, Inc.*), 269 B.R. 856, 861, 01.4 I.B.C.R. 144, 146 (Bankr. D. Idaho 2001) (citing *Jobin v. Otis* (*In re M & L Business Machine Co, Inc.*), 190 B.R. 111, 115 (D. Colo. 1995)).

[35] *Cossio v. Cate (In re Cossio),* 163 B.R. 150, 156 (9th Cir. BAP 1994) (citing *In re Park Nursing Ctr., Inc.,* 766 F.2d 261, 264 (6th Cir. 1985)).

5(b)(2)(D) allows service of those same documents by "electronic means" so long as consent is obtained in writing by the person to be served. Interestingly, the Rules Committee had the foresight to decide service by electronic means is "not effective if the party making service learns that the attempted service did not reach the person to be served."[36] No similar provision exists for first class mail in the Bankruptcy Rules.

Although *Flowers* does not allow parties to turn a "blind eye to subsequent events,"[37] it does seem to convey the message that the less you know after sending notice the better.[38] However, any purposeful lack of knowledge creates a substantial risk of violating due process. If the adequacy of the notice is subsequently challenged and found to be defective the resulting judgment is void.[39] Thus, it is in everyone's best interest to ensure the validity of judgments by paying attention to subsequent events that indicate notice was not actually received by the target recipient.

B. Certified Mail Under the Bankruptcy Rules

Obviously, *Flowers* can be applied directly to those cases where certified mail is

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[36] Fed. R. Civ. P. 5(b)(3). The committee notes to the 2001 amendments, which added paragraph (3), state in part "actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service."

[37] *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000) ("We decline to adopt a *per se* rule which only examines notice at the time it was sent and turns a blind eye to subsequent events.").

[38] The *Flowers* Court noted the primary difference between *Mullane*, *Dusenbery* and *Flowers* was the fact that in former cases "the government attempted to provide notice and *heard nothing back* indicating that anything had gone awry." *Id*. at 4 (emphasis added).

[39] *Hasso v. Mozsgai* (*In re La Sierra Financial Services*), 290 B.R. 718, 732 (9th Cir. BAP 2002) (citing *Kaczmarczik v. Van Meter* (*In re Van Meter*), 175 B.R. 64, 67 (9th Cir. BAP 1994)).

required under the Bankruptcy Rules, as it is in 7004(h). Under that rule, service of process on an insured depository institution requires certified mail.[40] If, for some reason, the certified mail is returned undelivered, additional steps must be taken to effectuate constitutionally sufficient notice. What additional reasonable steps are required will depend on the facts of the particular case.[41] If the institution were a large company like Wells Fargo or U.S. Bank, it may be reasonable to track down a phone number and place a call to ascertain the correct address to resend the certified letter to.[42]

C. Notice by Publication

Given its treatment by the *Flowers* Court, bankruptcy judges may be more cautious before authorizing notice by publication. Attorneys should be equally wary before seeking such authorization. Bankruptcy Rule 2002(l) allows the court to order notice by publication as a supplemental measure or if notice by mail is impracticable.[43] *Flowers* strongly suggests that when mail is returned undelivered, notice by publication will rarely be a suitable second option. Remember, the majority equated notice by publication with doing "nothing."[44]

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[40] Paragraphs (1), (2) and (3) provide exceptions to this requirement.

[41] *Flowers*, slip op. at 9.

[42] The *Flowers* Court specifically found open-ended searches of the phone book or inquiries into the public record to be overly burdensome. However, Wells Fargo is a large company with its own website and prominent listings in the phone book. In some cities, it occupies entire buildings. With such abundant access, it seems unreasonable to resend process via first class mail, as suggested by the Court. Furthermore, such a step may not be allowed under the rules anyway.

[43] *See also* Fed. R. Bankr. P. 9008 (court determines form and manner of publication).

[44] *Flowers*, slip op. at 12.

Flowers could also impact Fed. R. Bankr. P. 7004(c). That rule provides that if service on a party to an adversary proceeding in which rights to property are at stake cannot be effectuated by personal service or first class mail, the court may authorize mailing notice to the party's last known address and then notice by publication. Depending on the facts of the case, compliance with this Rule may not meet the *Flowers* standard. For instance, if service is attempted at the party's last known address and fails, followed by mail to the same address which is returned undelivered, it may be unreasonable to immediately follow up with notice by publication without making additional efforts to find an alternate address. If the property being affected is the home itself, the *Flowers* Court suggests posting as a reasonable additional step before publication. Absent a home to post, an inquiry with the clerk and the opposing attorney for alternate addresses could be reasonable additional steps to take prior to publication.

D. Failure to comply with address requirements

The Code and the Rules are rife with notice of address provisions, for debtors and creditors alike. For instance, Fed. R. Bankr. P. 1007(a)(1) requires debtors to file a list containing the names and addresses of creditors. Debtors must also file a statement of any change of address pursuant to Fed. R. Bankr. P. 4002(5). Furthermore, Section 342 is loaded with notice of address provisions for creditors. So what happens when a notice letter is returned 'undelivered' due to a party's failure to post a correct address?

Courts have held that service is not defective where the target recipient failed to

follow the address requirements of the Bankruptcy Rules.[45] However, in light of *Flowers*, an opposing party's failure to adhere to the various address rules may not be enough to defeat a constitutional attack. An argument could be made that a party's "failure to comply with a statutory obligation" to file a correct and current address does not "forfeit [their] right to constitutionally sufficient notice."[46] This is especially true when the subject matter of the hearing "concerns such an important and irreversible prospect" as the deprivation of an interest in property.[47] Although mailing notice to an address filed with the Court lends strong support to the argument that notice was reasonably calculated to reach the target party, the sender makes a potentially perilous decision by ignoring a notice letter returned undelivered.

1. A Hypothetical

Archie and Jughead are business partners. One day, Reggie offers them an opportunity to invest in a new business enterprise he controls. Intrigued, Archie and Jughead give Reggie $300,000. Reggie, in turn, gives them assurances they will double their money in less than six months. The "business enterprise" turns out to be a Ponzi scheme. Archie and Jughead lose everything. They, along with half of Riverdale, sue Reggie for fraud. Reggie files for chapter 7 bankruptcy *pro se*. Soon after, he is arrested

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[45] *Hammer v. Drago* (*In re Hammer*), 940 F.2d 524, 526 (9th Cir. 1991) (Upholding default judgment against debtor where opposing party mailed summons and complaint to address listed on debtor's petition, even though summons and complaint were returned undelivered). *See also In re Muzquiz*, 122 B.R. 56, 59 (Bankr. S.D. Tex. 1990) (service not defective where debtor failed to notify court of new address).

[46] *Flowers*, slip op. at 10.

[47] *Id*. at 8.

for securities fraud. The story makes front-page headlines in the Riverdale Herald and tops the local television news.

Incensed, Archie and Jughead, through their attorney, file an adversary complaint alleging Reggie's debt to them is nondischargeable under § 523(a)(2)(A). The summons and complaint is mailed to the address listed on Reggie's bankruptcy petition. However, it comes back undelivered. Archie and Jughead's attorney later explains to the bankruptcy judge how difficult it has been tracking Reggie down, so the judge authorizes notice by publication. Invariably, Reggie does not answer the complaint and a default judgment is entered.

In the meantime, Reggie has moved in with Dilton but has not provided his new address to the court. He files a § 522(f)(1) motion, seeking to avoid a second lien on his house held by Riverdale State Bank, a small local bank. Reggie sends notice via certified mail in conformance with Fed. R. Bankr. P. 7004(h). As it turns out, the bank is in the process of moving into a new location, and in the confusion, the notice is returned as undeliverable. Reggie calls the bank and speaks with an attorney who "deals with the bankruptcy stuff" and tells him about the § 522(f)(1) motion. The attorney gives Reggie the bank's new street address. However, Reggie does not resend the notice via certified mail.

Later that day, Moose, the trustee in Reggie's case, checks his email box and sees the § 363(f)(4) notice he sent Gotham Bank, the first lienholder on Reggie's house, was returned undelivered. Reggie told Moose at the § 341 meeting he was in a lawsuit with Gotham regarding the bank's interest in his home. Moose is not so good with computers

so he ignores the message. Riverdale Bank does not appear at the § 522(f)(1) hearing. Gotham Bank fails to appear at the § 363(f)(4) hearing. Both motions are granted without objection.

2. The Outcome, post-*Flowers*

Archie and Jughead's attorney complied with Fed. R. Bankr. P. 7004(b)(9) by sending a copy of the summons and complaint to Reggie via first class mail to the address listed on his bankruptcy petition. However, once the letter was returned undelivered, they would have been wise to pick up the phone and call the clerk, or even Reggie's attorney in the state court lawsuit, for any alternate addresses. It would have also been prudent to consult the electronic docket for any other addresses contained in the files. Additionally, if Archie and Jughead's attorney was aware of Reggie's arrest, a call to the police department may have been a reasonable additional step. Just to have his/her ducks in a row, Archie and Jughead's attorney should have detailed his/her efforts in an affidavit to be attached to the request to provide notice by publication.[48] Likewise, the judge probably should have inquired further about efforts to find Reggie before authorizing notice by publication under Fed. R. Bankr. P. 2002(l).

As to Reggie, the followup phone call to the bank's "bankruptcy guy" was a good first step, but he should have resent the certified letter once he obtained the correct address. Failure to do so appears to violate Fed. R. Bankr. P. 7004(h) even though the

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[48] In the alternative, the affidavit should explain why, under the circumstances, "no additional steps. . .could have been taken upon return of the unclaimed notice letter[.]" *Flowers*, slip op. at 12-13.

phone call may have been enough to give Riverdale State Bank actual notice of the bankruptcy.

Moose, at the very least, should have tried to resend the email notice to Gotham. Returned email, like returned certified mail, does not necessarily mean the target recipient is not present at that address. It simply means no one at that address claimed the notice. Gotham's email box may have been full, or there may have been network problems. Resending the email, like resending a letter by first class mail, would have been a reasonable first step. If the second attempt fails, both Rule 5(b)(2)(D) and *Flowers* seem to require additional steps, like sending a certified letter, or if permitted, first class mail.

V. CONCLUSION

The *Flowers* decision should not have a momentous impact on the bankruptcy world. However, practitioners should be aware the Supreme Court upped the ante when it comes to giving notice of proceedings that affect property rights. The next time you hear "Return to Sender" do not think of the King, think of "additional reasonable steps" you should take to satisfy constitutional due process. Elvis may be dead, but the Fifth Amendment is alive and well and could be returning (undelivered) to a mailbox near you.